

Government of the District of Columbia

OFFICE OF THE CORPORATION COUNSEL

DISTRICT BUILDING

WASHINGTON, D. C. 20004



IN REPLY REFER TO:
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(91-502-L) (LCD-5900)

November 7, 1991

James W. Johnson
ANC Commissioner, SMD 5A01
14th and Irving Streets, N.E.
Washington, D.C. 20017

Re: May ANC Commissioners fill a Commission
vacancy by secret ballot?

Dear Mr. Johnson:

This is in reply to your November 1, 1991 letter to the Corporation Counsel in which you request the legal advice of this Office as to whether ANC 5A may properly fill a vacancy on the Commission by secret ballot.

In your October 28, 1991 letter on this subject to Emmett H. Fremaux, Jr., the Executive Director of the D.C. Board of Elections and Ethics, you indicated that on October 23, 1991, the Commissioners of ANC 5A used the secret ballot method to fill a vacancy on the ANC. Assuming that the secret ballot method was in fact used, the election was legally ineffective because it violated the Self-Government Act's open meetings provision, D.C. Code § 1-1504(a), which is made applicable to the ANCs by D.C. Code § 1-262(g). That was the advice contained in a letter, dated April 28, 1988, from Margaret L. Hines of this Office to Valerie Costelloe. That advice was subsequently reaffirmed by Corporation Counsel Frederick D. Cooke, Jr. in a letter, dated February 16, 1989, to Philip Mendelson. (Copies of these letters were sent to you by Mr. Fremaux on October 30, 1991.)

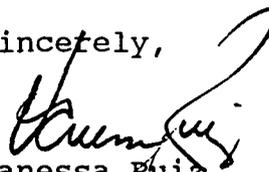
You state in your letter that you understand that "the appointee in the questioned election has been sworn in" and ask "[w]hat validity, if any, does this [swearing in] action" have. The use of the secret ballot rendered the action of the Commission legally ineffective at the time it was taken. Therefore, a subsequent swearing in of the person improperly appointed can have no curative effect.

You also ask that this Office "identify by statute the process by which ANC election/appointments to fill Commissioner

vacancies are to be challenged." In his October 30, 1991 letter to you, Mr. Fremaux explained why the filling of this vacancy on ANC 5A is governed by the law as it existed prior to the changes effected by the Advisory Neighborhood Commission Amendment Act of 1990, D.C. Law 8-203, which requires that a Commission vacancy be filled via an election by the single member district's voters. Under the law applicable to the filling of this vacancy, after the ANC has voted to appoint a person to fill the vacancy, the ANC is required to adopt and transmit to the Board of Elections and Ethics "a resolution signed by the Chairman and secretary of the Advisory Neighborhood Commission to declare the vacancy filled." D.C. Code § 1-257(d)(5)(C-1) (1987). Upon receipt of the resolution, the Board of Elections and Ethics is required to "certify the filling of the vacancy by publication in the District of Columbia Register." D.C. Code § 1-257(d)(5)(D) (1987). The statute sets forth no procedure for challenging such a resolution transmitted by an ANC to the Board of Elections and Ethics. However, any person who allegedly holds public office illegally may be sued in a court of general jurisdiction, such as the Superior Court, in a civil action in the nature of action for the issuance of a writ of quo warranto. When such an action is filed, the court examines whether the person sued is legally "entitled to hold the office and discharge its functions." 65 Am. Jur. 2d Quo Warranto § 19 (1972). Moreover, "[q]uo warranto is appropriate to oust persons holding office on the basis of a void election." Id., at § 24.

To summarize: If ANC 5A voted by secret ballot on October 23, 1991 to fill a vacancy on the Commission, then that action was without legal effect, and ANC 5A should hold a new vote in compliance with the open meetings provision of the Self-Government Act, D.C. Code § 1-1504(a). The remaining members of ANC 5A should vote in a manner similar to that which ANC 5A uses to vote on motions that come before it. The regular methods of voting on motions, as listed in Roberts Rules of Order § 44, p. 346 (1970 ed.), are by voice, by rising, or by a show of hands. These voting methods permit the public to determine how each member of the Commission voted. In this regard, it is relevant to repeat what we stated in our letter of April 28, 1988 to Valerie Costelloe (at page 3): "An ANC...is a publicly elected body whose members are accountable to the electors of their single-member districts. Voting by secret ballot is inconsistent with such accountability."

Sincerely,


 Vanessa Ruiz
 Deputy Corporation Counsel, D.C.
 Legal Counsel Division

cc: The Honorable James E. Nathanson

Mary Baird Currie
Chairperson, ANC 5A

Emmett H. Fremaux, Jr.